

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 18, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1116**

**Cir. Ct. No. 2010CV2897**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**BERNADINE LOZANO,**

**PLAINTIFF-APPELLANT,**

**V.**

**JIMMY D. BOYD,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Bernadine Lozano appeals an order dismissing her negligence action against Jimmy Boyd at the close of her case. Lozano contends that the circuit court's factual findings as to negligence were clearly erroneous. We disagree. Accordingly, we affirm.

### *Background*

¶2 Lozano’s son was fatally injured in a traffic accident when he was a passenger in a Department of Corrections van en route to a work site. Boyd was driving the van on a clear evening in a rural area, and was using the van’s high beams. Boyd swerved to the left when he spotted an opossum to his right on the shoulder of the road. The van crossed two to three feet over the center line of the highway, and Boyd steered back to the right. The right hand turn moved the van too far to the right and Boyd attempted to again steer to the left. However, the van traveled onto the right shoulder of the road; the right tires of the van furrowed into the gravel shoulder and grass; and the vehicle rolled over.

¶3 Lozano filed this negligence action against Boyd. During a trial to the court, Lozano called two adverse witnesses: Boyd and the defense expert witness, Duane Meyers, who conducts accident reconstructions for the Wisconsin State Patrol. At the close of Lozano’s case, as to liability, the circuit court found that the evidence did not establish that Boyd was negligent. Lozano appeals.

### *Standard of Review*

¶4 “As a general rule the existence of negligence is a question of fact.” *Hueser ex rel. Jacobs v. Community Ins. Corp.*, 2009 WI App 151, ¶11, 321 Wis. 2d 729, 774 N.W.2d 653. Following a trial to the court, we uphold the circuit court’s factual findings unless those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2011-12).<sup>1</sup> A circuit court’s factual findings are not clearly

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

erroneous if they are supported by any credible evidence in the record, or any reasonable inferences from that evidence. *See Insurance Co. of N. Am. v. DEC Int'l, Inc.*, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). Additionally, a circuit court acting as fact-finder is the “ultimate arbiter of the credibility of the witnesses.” *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

### *Discussion*

¶5 A negligence claim has four elements: “(1) the existence of a duty of care on the part of the defendant, (2) a breach of that duty of care, (3) a causal connection between the defendant’s breach of the duty of care and the plaintiff’s injury, and (4) actual loss or damage resulting from the injury.” *Gritzner v. Michael R.*, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906. Here, following Lozano’s presentation of her case to the court, the court found that Boyd was exercising ordinary care in driving at the time of the accident, and thus was not negligent. *See id.*, ¶22 (“A person is negligent when [he or she] fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances.” (citation omitted)). The court also determined that, although Boyd’s failure to wear his seatbelt and ensure others were wearing their seatbelts was not ordinary care, there was no causal connection between the lack of seatbelt use and the accident. *See id.*, ¶19. Lozano challenges the circuit court’s factual findings that Boyd’s actions leading to the fatal accident did not support a claim of negligence. We address each challenged factual finding in turn.

*Circuit Court Finding #1: Boyd was not negligent in failing to see the opossum from a greater distance*

¶6 Boyd testified that he did not become aware of the opossum until the van was within eight feet of it. The circuit court found that, although the evidence established that the headlights of the van illuminated the road to a distance of 160 feet, the evidence did not establish that a reasonable person driving the van could have spotted the opossum from that distance. The court found that Boyd was keeping a careful lookout, yet was unable to see the opossum until he was nearly upon it. The court noted there was no evidence that Boyd was distracted or not paying attention, and that the evidence did not establish that a reasonable person could have seen the opossum on the side of the road from a greater distance.

¶7 Lozano argues that the circuit court's finding that Boyd was not negligent in failing to see the opossum from a greater distance was clearly erroneous. She contends that the court's finding was contrary to Meyer's testimony and common sense. However, Meyers did not testify that Boyd could have seen the opossum from 162 feet. Rather, he testified as follows:

Q. ... [T]he opossum should have been clearly visible at 162 feet out ahead of him, correct?

A. Well, it should have been visible if—again, there are complicating factors, though. That is a very general statement.

....

Q. So he should have been able to clearly see the opossum at 162 feet ..., correct?

A. Again, I don't like characterizing it as clearly could see because there are other issues as far as the detection of an animal or in this case a[n] opossum with respect to the relative contrast of the background.

Meyers then opined that the opossum would not have been very conspicuous to an approaching driver based on its small size and low contrast with the shoulder of the road.

¶8 We do not agree with Lozano that the circuit court's finding that Boyd was not negligent in failing to identify the opossum from a greater distance was contrary to the evidence and common sense. Meyers did not testify that Boyd could have seen the opossum from a greater distance; rather, he testified that the animal would not have been conspicuous despite the illumination from the headlights. We are also not persuaded the court's finding was contrary to common sense. Because the circuit court's finding was based on credible evidence in the record, we will not disturb it.

*Circuit Court Finding #2: Boyd was not negligent in his initial maneuver to evade the opossum*

¶9 The circuit court found that Boyd acted instinctively in swerving to the left to avoid the opossum on the right shoulder of the road. Lozano argues that this finding is clearly erroneous because the evidence showed that the opossum posed no actual hazard to the van; that Boyd had been trained not to sharply turn the van due to the danger of the van rolling over; and that Boyd's initial swerve to the left was not instinctive because a swerve is instinctive when there is no time to think about it and Boyd swerved to the left because he knew there was no oncoming traffic, and therefore, he had time to think about it. We are not persuaded.

¶10 Meyers testified that Boyd's initial swerve to the left was instinctive, and a normal response for drivers faced with a path intrusion or hazard. The circuit court was entitled to rely on that testimony and find that Boyd's response

was a normal, instinctive response, even though the animal may have posed no actual threat to the van and Boyd had been trained not to sharply turn the van. Additionally, we do not agree with Lozano that the swerve could not have been instinctive merely because Boyd knew there was no oncoming traffic. Thus, the circuit court's finding that Boyd's initial swerve to the left was not negligent is supported by credible evidence in the record.

*Circuit Court Finding #3: Boyd was not negligent in steering the van back to the right after crossing the highway's center line*

¶11 The circuit court found that Boyd acted with ordinary care in turning back to the right after he swerved left over the highway's center line. The court explained that Boyd was attempting to return the van to its lane of travel. Lozano argues that Boyd made a cognitive decision to steer right to return to his lane of travel. She argues Boyd consciously steered right too hard despite his awareness of the danger of the van rolling over and despite the fact that there was no oncoming traffic preventing Boyd from slowly returning to his own lane. Lozano contends that there is no evidence in the record to support the court's finding that Boyd used ordinary care in turning the van sharply to the right to return the van to its lane of travel. Again, we disagree.

¶12 Meyers testified that Boyd's turn to the right was a reasonable response to his perception that the van had crossed over the center line. Meyers also testified that the right hand turn was a physical response to Boyd's perception of the vehicle crossing the center line, and that his response would have happened "very, very quickly." The circuit court was entitled to rely on this testimony in finding that Boyd acted with ordinary care in his reaction to having crossed over

the center line of the highway. Accordingly, the finding is supported by credible evidence.

*Circuit Court Finding #4: Boyd was not negligent by driving at or around the speed limit*

¶13 The court found that, under the circumstances here, Boyd's decision to drive at or around the speed limit of fifty-five miles per hour was reasonable. Lozano argues that this finding was clearly erroneous because Boyd indicated he had applied the brakes prior to the point at which the van's speed was estimated to be around fifty-five miles per hour, and it was not reasonable for Boyd to be driving the van at fifty-five miles per hour at night. We disagree.

¶14 Meyer testified that he determined that Boyd was traveling between forty-nine and fifty-five miles per hour at the time he had crossed over the center line and was steering back into the right lane of travel. The circuit court found that Boyd acted with ordinary care by driving at or around the speed limit, which was fifty-five miles per hour. It acknowledged that Boyd had stated he applied the brakes after spotting the opossum, and therefore Boyd may have been traveling at a higher rate of speed prior to that time. However, the court found that the evidence that Boyd was traveling within the speed limit was credible. The court also acknowledged that the van's operating manual indicated that the driver should reduce speed at night, but found that fact unhelpful in that it did not state what speed would be reasonable. It noted that the night was clear and the highway was straight, and determined that it was not unreasonable for Boyd to be driving at the speed limit under those conditions. The court's finding was supported by the evidence.

*Circuit Court Finding #5: Boyd was not causally negligent by failing to secure his seatbelt or ensure all passengers were using their seatbelts*

¶15 Finally, the circuit court found that there was no evidence to support a finding that lack of seatbelt use contributed to the accident in this case. Lozano contends that the court's finding was clearly erroneous because common sense dictates that lack of seatbelt use contributed to the accident. She points out that the unbelted passengers were an unsecured load, and Boyd had been trained that an unsecured load could affect his ability to control the van. She also points out that seatbelts are designed to help drivers stay firmly behind the wheel, and that there is no way to establish whether Boyd's failure to use his seatbelt contributed to his loss of control of the van. We are not persuaded.

¶16 While Lozano points out that, in general, an unsecured load and an unbelted driver may contribute to an accident, she points to nothing in the record indicating those factors contributed to the accident in this case. To the contrary, Meyer's report indicates that the van would have rolled over even if the occupants had been wearing seatbelts, and that it was unlikely that Boyd had been displaced from his seat during his steering maneuvers to an extent that would have caused him to lose control of the vehicle. Accordingly, this finding is also supported by the record.

¶17 Because each of the circuit court's factual findings as to negligence are supported by the record, we affirm.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

